Questions Presented

In the Court below, appellants asked the Court of Appeals of the State of New York to declare the limiting portions of these statutory provisions in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The arguments objected to the statutes in the following particulars:

1) In discriminating between capital and non-capital cases for the providing of funds to assigned counsel, both for experts and for legal services, the State laws denied DOWDLE, indicted for a non-capital felony, (a) equal protection of the law, and (b) due process of law. Equal protection is violated because in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) this Court overruled the special circumstances rule of *Betts* v. *Brady*, 316 U. S. 455 (1942), and declared that *ALL* indigent defendants had a constitutional right to the assistance of counsel. Due process is violated because the State's highest Court has interpreted Section 308 of the Code of Criminal Procedure to permit the hiring of psychiatric experts *ONLY* in capital cases, regardless of the demonstrated need, *Marcus* v. *Joseph*, 305 N. Y. 813 (1953) and likewise permits payment of compensation for services of counsel *only* in capital cases; thus, in effect, denying to non-capital indigent defendants counsel who can assist in their defense in a meaningful way.

2) In providing prosecutors with unlimited funds in all cases, *N. Y. County Law*, Section 825, capital, non-capital, misdemeanor, and felony; and in specifically prohibiting, in all but capital cases, the payment of any compensation to assigned counsel for anything, *N. Y. County Law*, Section 718, the State denied DOWDLE the equal protection of the law.

3) In providing for authorization and permission of the trial Court in advance of, and as a precondition to, the employment of any experts, *N. Y. Code of Criminal Procedure,* Section 308, Memorandum opinion of the Court of Appeals in this case, pp. 14, *infra,* the State denies to the indigent defendant, and denied to the Appellant, DOWDLE, in this case, the benefit of the good faith judgment of assigned counsel; and because of this substitution of judgment and preliminary gauntlet of merit, the State violates due process as this Court has interpreted that phrase. *Douglas* v. *California,* 372 U. S. 353 (1964).

Statement of the Case

On the day after Christmas, 1965, Joan Henderson waited at a bus stop, in her usual manner, to go to work. Several other persons stood by. Appellant DOWDLE, who was at that time a patient at the Rochester State Hospital and who had been civilly certified for psychiatric treatment there, approached her from behind and grabbed her about the waist (R. p. 3, 22). Passers-by frightened DOWDLE away and no harm came to Miss Henderson.

On these facts the Grand Jury of Monroe County indicted DOWDLE for attempted first degree rape, (R. p. 3).

DOWDLE was at all times an indigent (R. p. 13). The County Court assigned counsel to defend him in the person of Matthew T. Hogan, Esq. (R. p. 15).

The State examined DOWDLE psychiatrically and found him competent to stand trial (R. p. 15, 16). To rebut this finding and to acquire a *complete* psychiatric picture, Counsel who was originally assigned searched for funds from DOWDLE'S mother, but in vain (R. p. 16). He then asked Dr. William Libertson, a psychiatrist, to examine DOWDLE and to give a psychiatric report on him. At this

point, New York law provided for experts *only* in capital cases, N. Y. CODE OF CRIMINAL PROCEDURE, Section 308, *Marcus* v. *Joseph*, 305 N. Y. 813 (1953). Even then, permission to employ, and the actual employment of the expert, rested in the sole discretion of the *Court, NOT* counsel.

Dr. Libertson's report related the whole psychiatric history extending over a seven year period. While the report did not allow for the defense of legal insanity-delusions, hallucinations and psychotic separation from reality—(but see how quickly this rule of law is changing in New York, *U. S.* v. *Freeman*, 357 F. 2d 606 (1966).); its contents clearly drew in question the element of *mens rea*, or the criminal state of mind. This defense would have been grounds for a *not guilty* finding to any charge, even a misdemeanor. N. Y. PENAL LAW, Section 244, 245.

Assigned counsel, inexperienced in criminal psychiatry, and involved in the press of business, overlooked this point. He pleaded DOWDLE guilty to the felony charge (R. p. 17).

Later on, when the law firm as a whole reviewed the case, the psychiatric defense became apparent, and assigned counsel and others moved to vacate the plea of guilty and enter a defense. The district attorney resisted vigorously but the Court granted the motion *AFTER* reading Dr. Libertson's report. The prosecution failed to contradict that report in answering the moving papers.

Although Dr. Libertson acknowledged a willingness to testify at the trial, there were no funds to pay his fee for such testimony. He had not yet been paid for the report, although his bill for services arrived on May 11, 1964. (No one has yet paid him.) He would not testify without payment in advance.

There was no legal authority under which a New York Court would entertain a prior application to pay Dr. Libertson for his testimony. There was no way to make the application prior to trial and appeal it. N. Y. CODE OF CRIMINAL PROCEDURE, Sections 515, 517, limits appeals in Criminal cases to review of *FINAL* judgments. Appellate courts in New York may not review interlocutory orders of the trial judge. Thus, at the point when the Court granted the motion to withdraw the plea of guilty, DOWDLE, who was in jail *at all times* during the proceedings, had the following options:

1) Stay in jail for a sham trial without a psychiatric expert, undergo a *FINAL* judgment of conviction for attempted first degree rape, and appeal the refusal to grant a psychiatrist through the State Court system. Estimated time to reach the Court of Appeals: Eighteen (18) to Twenty-four (24) months. Outlook: Fair to good, for a *New Trial.* Total time in jail prior to *second* trial: Thirty (30) to Thirty-six (36) months. Risk: High because of a *FELONY* conviction.

2) Move for a psychiatric expert in advance of trial upon papers and statutes. File order of County Court denying request for a psychiatrist. Appeal this order directly to the Supreme Court of the United States. Estimated time to reach the Supreme Court: Six to Eight (8) months. Outlook: Extremely poor. Total time required to eliminate option: One (1) year, with Option 1 to follow.[1]

3) Accept the offer of the District Attorney to plead guilty to third degree assault. Appeal that conviction on the ground that denial of funds for experts, and for legal services, in effect, coerced the plea to this misdemeanor. Move for payment

[1]Naturally this is a lawyer's guess. However, the problems of federalism involved in taking a novel question to the Supreme Court of the United States without first affording a state appellate court the opportunity to review it are formidable and discourage optimism in outcome.

to Libertson and appeal the order denying payment. Estimated time: Four (4) months in jail, Two (2) to three (3) years in Courts. Risk: Very low, misdemeanor plea limits sentence to one (1) year. Outlook: Fair to good, for ultimate reversal and new trial without the prospect of being in jail all the while.

DOWDLE himself reluctantly chose the third option. He pleaded guilty to third degree assault and the Court sentenced him to the maximum of one (1) year. (R. pp. 4-5).

Counsel obeyed DOWDLE'S instructions in the matter because indigents must stay in jail despite any defense they have, and despite their innocence. Indigents cannot raise bail. Their legal remedies and the effect of their pleas must be regarded in the light of their condition. Our legal system does not accord these accuseds the liberties which the presumption of innocence requires. No attorney can refuse to follow their decisions, therefore, and keep them confined for long periods in jail in order to proceed from a better strategic position legally. Whether they wish to suffer confinement for several years to prove a legal point is up to them — not up to counsel. Dowdle chose the plea of guilty to a lesser offense and what man can fault him for it?

In any event, shortly after sentencing, appellants Dowdle and Hogan, moved to set aside the conviction on due process grounds, and moved for orders directing payment to Dr. Libertson and to assigned counsel (R. pp. 11, 12). In addition, appellants moved to take the testimony of the Director of the Indigent's Defense program of Monroe County (R. p. 11). This last motion hoped to put on record the workings of a system in Rochester, New York, that gave assigned counsel no financial help whatsoever for legal services rendered, and no money to hire experts. The County Court denied all motions without comment. The Appellate Divi-

sion did likewise, unanimously (R. pp. 32-34). Upon application for leave to appeal to the Court of Appeals of the State of New York, counsel for appellants limited the question for review solely to the issue "whether the Fourteenth Amendment to the Constitution of the United States requires the State of New York in circumstances such as this case presents to provide expert witness fees and reasonable attorney's fees" (R. pp. 39-40).

The Court of Appeals granted leave in April 1965. In October, the Court heard argument. In November, the Court entered its memorandum opinion and unanimous affirmance.

The decision of the Court of Appeals came *after* the New York State Legislature had enacted Chapter 878 of the *Laws of New York,* 1965. This act nullified, prospectively, the effect of Section 308 of the Code of Criminal Procedure, and repealed its provisions distinguishing between capital and non-capital cases. It awarded counsel fees and fees for experts. See *County Law of New York,* Art. 18—B, Section 722 b and c. It became effective December 1st, 1965.

This new law, therefore, did not aid Dowdle. But it did render moot in a very practical way, the policy arguments which appellant had brought to the Court of Appeals for review. The new statute had no legal effect on these questions, however, and the Court of Appeals ruled on the Constitutional issues.

In respect to the opinion of the Court of Appeals, which mandated an effort to secure court authorization in advance of retaining the physician, (a procedure which is tantamount to a preliminary gauntlet of merit, and which, for that reason, violates the principles of due process this court enunciated in *Douglas* v. *California,* 372 U. S. 353 (1964))

appellant urges the point that prior court authorization, in the summer of 1964, had no possible chance of success. It was a meaningless gesture. There is no warrant in law for a futile act. Many New York cases held directly against it.[2] The only case on point is *this* case, decided more than a year *AFTER* the original application. The fact is that appellants *did apply* for confirmation of their good faith acts as officers of the Court prior to appeal. If prior application to the trial judge had a chance of success, why did the motion to confirm fail? The trial was the same. The motion happened within a few short weeks of the retainer of the psychiatrist. What does the Court of Appeals suggest would be different if the attorney asked for payment *before* rather than *after* employment?

This ruling is not, appellants submit, an independent procedure which state law *required at the time,* and with which the failure to comply would constitute adequate state grounds for precluding consideration of the constitutional issues. This is merely a device to dodge and avoid confrontation with a serious due process issue, and for very understandable reasons.

The Questions Presented are Substantial

Despite the opinion of the Court of Appeals to the contrary, appellants contend that: 1) the judgment of conviction is void because the plea of guilty was, in fact, coerced under the assigned counsel — no bail — no money system practiced in Rochester, New York, and 2) the defendant, Dowdle, did not get the benefit of Dr. Libertson's services, because Dowdle could not afford to pay the psychiatrist's

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[2]Indeed, until the prosecution used experts, the state would grant none to the defendant. *People* v. *Konono,* 31 Misc. 2d 90 (1961). Compare also *People* v. *Harvey,* 24 Misc. 2d 1022 (1960), *People* v. *Leach,* 42 Misc. 2d 143 (1964); *Matter of Grossman,* 261 App. Div. 1112 (1941).

fee for testimony at the trial. See *U. S.* v. *Baldi,* 192 F. 2d 540 (3rd Cir. 1951). The lack of money was the most significant factor in the decision to plead guilty. That fact alone constitutes a denial of due process of law, vitiates the judgment of conviction, and demands a new trial.

> ". . . there can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." *Griffin* v. *Illinois,* 351 U. S. 12 at 19 (1956).

Advocates who have pleaded many appellate cases are divided in their recommendations as to what a jurisdictional statement, or a prayer for certiorari, to this Court should contain. Some say throw in the whole case, law, facts, and a Brandeis brief. Some say follow the Court rules and make it short and to the point. Probably each method has merit.

This case must reach your court, if at all, on the simple statement that Dowdle, and millions like him, did not get a fair trial. Since the decision in *Gideon* established the constitutional right to the assistance of counsel in all criminal cases, the states have wrestled between the sham of *pro-forma* appointments and the triumph of truly effective representation. The cost — the proverbial 'where's the money coming from?' — has emerged as a fundamental obstacle to universal recognition of this constitutional guarantee.

One State, at least, has taken the lead through the judicial branch of government. *State* v. *Rush,* 46 N. J. 399, 217 A. 2d 441 (1966). Skirting, hurdling, and pole-vaulting the constitutional questions like an olympic pentathelon runner, Chief Justice Weintraub of the New Jersey Supreme Court has ordered compensation paid to assigned counsel as of January 1, 1967. But in respect to the disbursements required to present a proper defense, that same Justice did not hesitate:

"The obligation of the State to provide the indigent with the means for an appropriate defense rises from an interplay of the constitutional rights to counsel, to a fair trial, and to equality before the law." 217 A. 2d at 450.

The instant case presents the constitutional questions whether a State must provide some funds to counsel (a) for expert witnesses and the like in order to press a legitimate defense and (b) for services which counsel renders in the defense and appeal of the case.

Naturally the Sixth and Fourteenth Amendments are silent on the specifics of what comprises "due process" or the "assistance of counsel". There is, too, much force in the argument that *no* court should write into a Constitution its own specific preferences as to how a State should comply with due process in criminal prosecutions.

But if no specifics are forthcoming from this Court, the promise of *Gideon* shall wither and weaken until it becomes a fatuous platitude. *Gideon* made no difference to Dowdle. The County Court of Monroe County has always appointed counsel in felony cases. It did so, of course, long *after* police interrogation, confinement without bail, holding incommunicado, confession, waiver of preliminary hearing and grand jury presentment, — as standard procedure. That's what happened in this case. Here, however, the psychiatric history of the defendant gave defense counsel the opportunity to resist the charge with an intelligent, and possibly effective, plea. *Gideon's* silence on the question of what specifically constitutes the assistance of counsel left the door open for all the Courts of the State of New York to affirm a conviction wrongfully wrought from an indigent's coerced plea of guilty.

These questions will not go away. They have lain unanswered beneath the surface since *Powell* v. *Alabama*, 287 U. S. 45 (1932). They shall burst upon the floor of State Appellate Courts en masse now that New Jersey has acted.

Dowdle's plea should speak for all of them.

CONCLUSION

Appellants respectfully ask that the Court note probable jurisdiction in this cause and place the case upon its calendar for argument on appeal.

Dated: June 1, 1966

Respectfully submitted,

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APPENDIX

Decision

COURT OF APPEALS — NOVEMBER 24, 1965

4. No. 297. 65

The People &c.,

Respondent,

vs.

Richard Allen Dowdle,

Appellant.

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In the Matter of the Application of Matthew T. Hogan & ano.,

Appellants,

vs.

Gordon Howe, Director of Finance of the County of Monroe, New York, & ors., &c.,

Respondents.

—

Judgment and order affirmed. Appellant does not demonstrate any legal infirmity in the judgment of conviction for assault, third degree, entered on his plea of guilty. On the appeal from the affirmance of the order denying the application of attorneys for payment of the fee of a psychiatrist retained by the attorneys no constitutional rights of defendant are shown to have been violated since he had the benefit of the physician's services. No rights of the petitioner-attorneys or of the physician were violated by the refusal to pay the fee since no effort was made to secure court authorization in advance of retaining the physician.

No opinion.

All concur.